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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-472

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian ad Litem, and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Robin Dugan, an infant, by Donald Dugan, her Guardian ad Litem, and Donald Dugan, petitioners respectfully pray that a writ of certiorari issue to review the order of the Appellate

Division, Second Departments of the Supreme Court of the State of New York, entered in this action on February 16, 1971.

Opinion Below

No opinion was rendered by the Appellate Division in connection with the order sought to be reviewed. No opinion has been rendered in this action though it has been tried and appealed twice, except an opinion by the Appellate Division on the reversal of the judgment after the first trial, which is reported as Dugan v. Dieber, 32 A.D.2d 691, 302 N.Y.S. 2d 423, and a memorandum decision rendered with an order denying petitioners' application after the second trial for judgment notwithstanding the verdict or to set aside the verdict, which is not reported.

Jurisdiction

The order of the Appellate Division, Second Department, of the Supreme Court of the State of New York was entered on February 16, 1971. A timely application to that Appellate Division for permission to reargue the appeal or for leave to appeal to the Court of Appeals of the State of New York was denied by order entered April 9, 1971. A timely application to the said Court of Appeals for permission to appeal to that Court, based upon the said Appellate Division's refusal, was denied on July 7, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

Questions Presented

1. Does the New York Civil

Practice Law & Rules §603, in empowering that state's judiciary, "In furtherance of convenience or to avoid prejudice. . .[to] order a separate trial . . . of any separate issue. . .," thereby deprive a plaintiff, in a personal injury case arising out of an automobile accident, of property in violation of the Fourteenth Amendment in that the issue of liability may be tried separately and initially from the issue of damages, which separate trial thereby prevents such a plaintiff from introducing testimony on the damage issue which bears upon and proves or substantiates the defendant's liability or the plaintiff's lack of contributory negligence and such inability so to prove lessens or destroys the value of the plaintiff's cause of action or renders insufficient or weakens the plaintiff's

proof on the liability and his cause of action and also does not present to the trier of the facts the correct and true picture of the liability situation?

2. As applied to the instant fact situation, can the New York judiciary, in violation of infant plaintiff's rights under the Fourteenth Amendment, order and direct a separate trial on the liability issue solely and without reference to, and on the trial reject, any proferred testimony or evidence concerning plaintiff's injuries when she was 5 1/2 years old in 1959 when hit and thrown 10 to 12 feet and thereby suffered and still suffers from extensive brain damage which prevented and still prevents her from knowing or recalling anything and therefore testifying about the accident (i.e., she was and is practically and legally dead for this

case), and also compelling her to assume the onus to prove her freedom from contributory negligence which is not assumed by others in analogous cases and situations, and which condition also permitted defendant, as the only witness to the accident itself, to give several versions at the second trial different from and inconsistent with his earlier claims and testimony, and simultaneously prevent plaintiff from offering proof of the impact or injuries so as not only to prove her cause of action in direct and positive terms but also to show and prove that her injuries were in fact caused by defendant's negligence, and also to contradict and reply to defendant's tailored testimony and thereby present to the jurors the true picture?

3. On the facts as disclosed in the record, was the infant plaintiff deprived of her rights under the

Fourteenth Amendment in that she did not receive a full and fair trial because of the state appellate courts' sustaining of and the trial court's rejection of proferred testimony on the injuries claimed to bear upon and disclose liability in fact, its failure to relieve the infant plaintiff of the burden of contributory negligence because she was unable to testify on liability due to extensive brain damage resulting from the accident, its improper and prejudicial refusal to disqualify itself?

Statutory Provisions Involved

New York Civil Practice Law and Rules:

§603. Severance and separate trials

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any

separate issue. The court may order the trial of any claim or issue prior to the trial of the others. (Vol. 7B Mckinney's Consolidated Laws of New York Annotated)

Statement of the Case

In the daylight of the early evening of July 31, 1959, the infant petitioner, who was then five and one-half years of age and was not in the cross-walk, stepped off the curb and walked to the center of the roadway where she was struck by an automobile owned and operated by the respondent. The respondent did not sound his horn or give any warning of his approach. The street was a one-way street in a residential area of Brooklyn, New York, with private homes on each side which were separated by driveways. Cars were parked at both curbs, but there were

spaces between the cars. Children were playing on the sidewalk at the time. The respondent lived around the corner and was familiar with the neighborhood. He had seen children playing in the roadway of that street on prior occasions.

The only persons to witness the accident were the respondent and the infant petitioner. As a result of the accident among other severe injuries the infant petitioner suffered damage to her brain resulting in traumatic epilepsy and amnesia. Consequently, the respondent was the only eyewitness who could testify as to the happening of the accident.

The action in negligence was thereafter commenced to recover damages for personal injuries and medical expenses.

Pursuant to Section 603 of the

Civil Practice Law and Rules of New York, the case was tried before a jury on the issue of liability only.

As the only eyewitness who could testify as to the happening of the accident, the respondent gave the following version of how it occurred. He was riding down the street at fifteen miles per hour and didn't see the infant petitioner until she emerged from between two parked cars and ran into his vehicle. From the time he saw her till he hit her was "practically instantaneous" (350-352). From the time he saw her until he brought his car to a complete stop, it traveled half a car length (361). Upon impact the child dropped to the ground (370-371).

Petitioners attempted to prove that he was going much faster and did see the child much sooner but couldn't

stop because of his speed. They sought to prove speed through the distance the child was thrown and the extent of her injuries. However the Court sustained objections to the extent of injuries even though it was urged it was on the issue of liability.

The jury rendered a verdict dismissing the complaint. An appeal was taken to the Appellate Division the petitioner's contended that the unfairness of the trial rulings denied them due process of law as guaranteed by the federal constitution and cited the refusal to permit evidence of the extent of injury which was pertinent to the issue of liability as it was relevant to the speed respondent's vehicle was travelling.

The Appellate Division reversed the judgment and ordered a new trial on

the issue of liability only. It reversed because of prejudicial errors made in the admission of evidence, including a photograph of an apartment house which was not in existence at the time of the accident which unfairly supported respondent's version of the accident, as well as errors in the charge concerning speed of the vehicle, the infant petitioner's standard of care, her right to cross the street other than at the cross-walks and in many other respects. The opinion is included in the appendix to this petition. Nowhere in it did the Court treat of the constitutional question.

At the outset of the second trial--that is, during the voir dire to select the jury -- the same judge who presided at the first trial ruled petitioners' attorney was precluded from making the

jury aware during the case of the fact that the infant petitioner sustained serious injuries including brain damage resulting in epilepsy and amnesia. He shut off argument as to why it should be permitted and granted petitioner an exception to his ruling (2-5).

When the jury was completely selected and the case assigned to a part for trial it was ascertained that the Judge who was to preside had threatened to hold the petitioner's attorney of record, the infant petitioner's grandmother, in contempt of court in the only case in which she was ever a plaintiff, and that he still remembered the incident. The petitioners' trial attorney also had an appeal pending from a recent trial in which this Judge presided in which much of his brief was devoted to contention of errors committed

by this Judge in the admission of evidence and prejudice caused by his active role as an advocate and in rendering inflamatory gratuitous statements to the jury. As a consequence, it was requested that he disqualify himself, but he refused (6-11).

On the second trial the respondent was again the only eyewitness who could testify as to the happening of the accident. Aware of the observation in the Appellate Division's decision that if the cars were not parked as close as depicted in the inaccurate photo introduced on the first trial "this would bear on the question of whether or not the [respondent] should have seen the child much sooner than he did had he been exercising reasonable care" (Dugan v. Dieber, 32 A.D.2d 815), the respondent altered his version of the

accident to avoid lack of care for this reason. He also altered his testimony for the purpose of convincing the jury that the infant petitioner was contributory negligent. The lack of regard the respondent had for the truth and his oath almost defies human experience. In response to the question of where the infant was when he first saw her he gave many different answers between his examination before trial, on the first trial and on the second trial: "I saw her when she just about touched my hood" (252); "Emerging from behind the car" (358); "About 4 or 5 feet [away]" (335); "That is when you saw her, 24 feet away, right? Yes sir." (359). Thus between trials he altered that distance from just about touching the hood of his car to 24 feet. For the sake of consistency, he had to revise his testimony on the first trial to the effect that the child

dropped to the ground, but certainly not so much as would indicate his car was traveling at an excessive speed. On his examination before trial, he stated "she fell back" at one point (252p); and, "thrown onto the sidewalk. To the street" at another point (252i). On the second trial he bridged the gap with "Thrown or fell" (371). He further allowed that she was thrown "Approximately 3 to 4 feet in front of the car" (371).

The petitioners sought to establish excessive speed and lack of care by the respondent through the length of skid marks and stopping distances at various speeds (178-181); the distance the child was thrown on impact which was 10 to 12 feet (182); and his failure to sound his horn. No evidence of extent of injury was introduced because of the prior ruling and the exception allowed. During petitioners' case, the Court

instructed the jury that no inference is to be drawn that the infant petitioner's lack of memory is due to the accident (19-20).

At the close of the petitioners' case, the respondent moved to dismiss the complaint for petitioners' failure to prove freedom from contributory negligence. Petitioners' attorney argued that inasmuch as the child had amnesia as a result of the accident and could not testify as to how it happened, she was in legal contemplation "dead" for this purpose and that, as in a wrongful death action, the burden of proof on that issue should be borne by the respondent. The respondent did not urge that this was not reasonable, fair or logical. He objected on the ground that "there is no proof of amnesia". Of course there was no such proof; there

could be none under the circumstances. As set forth above, it was ruled by the Court at the outset of the trial, at respondent's insistence, that no such proof was to be adduced by petitioners, that such proof was improper in a trial solely on the issue of liability and exception was allowed to this ruling to preserve petitioner's rights to review this question. The Court tacitly acceded to respondent's position but failed to rule on the motion. This put respondent in the ideal position of being able to point out to the jury that the petitioners had the burden of proving freedom from contributory negligence though he knew they should not have such burden and the reason they had it was because they could not adduce evidence to have it shifted because of a ruling which they had to adhere to because they had been granted

legal protection. Respondent thereafter capitalized on this position to the extent that he reduced the trial from a search for the truth to a solemn mockery. In summation, and knowing that petitioners could not rebut it because of the ruling and the fact that they had an exception, respondent's counsel told the jury:

> "Somebody in this case has the burden of proof. The Judge will tell you. Now, in the burden of proof in proving the case, what factually happened? The plaintiff, because she was five-and-a-half years of age, took the stand and said she knew nothing, remembered nothing for some reason or another. Now, I say to you, is that proof, is that proof?" (409-411)

To insure the prejudice created, respondent made the "burden of proof" the theme of the next few minutes of his summation by stating it with emphasis five separate times during that short

interval.

As there wasn't and couldn't be any evidence of amnesia in light of the prior ruling, there was no basis upon which the burden of proof of contributory negligence could be shifted. The Court therefore charged that the petitioners had the burden of proving freedom from contributory negligence: "The plaintiff must satisfy you that she was free from contributory negligence." . . . .With this in mind you decide whether or not the plaintiff has established her freedom from contributory negligence, whether or not she has established the second of the two elements." (emphasis supplied). Later in the charge he stated:

> "I am going to give you an illustration of what is meant by burden of proof. Let's take this case A sues B. The testimony submitted by A in this

> illustration in support of his case that the testimony submitted by B in opposition to A's case is equally convincing, in that case the verdict must be in favor of B because A would have failed to establish his case by evidence which outweighs the evidence of B. Of course, if A's testimony is more convincing, has greater appeal than B's testimony, your verdict will be in favor of A. And lastly, if B's testimony is more convincing then your verdict will be in favor of B."
>
> "And so in this case the plaintiff has the burden of proof as to the issues involved in this case, that is the issues being her proof that the defendant was negligent and she was free from contributory negligence." (477-478)

After the Court completed its charge the petitioner's counsel, made the following objection:

> "Then just for the record Judge, I acceded throughout the course of this trial according to his Honor's direction not to go into any injuries sustained by this infant plaintiff and I would like to put on the record the fact that in a case of this

> type where speed of a vehicle and looking out were so essential as part of my proof, the preclusion by the Court of any allusion to the injuries sustained by the infant under the Benatti against the New York City Transit Authority doctrine, I feel was prejudicial, in error and I acceded to it because the Court said that this is the structure and the interdiction of the Appellate Division. But nevertheless to protect the record, I would like to take exception throughout the course of the trial to the Court's refusal to grant me such permission.
>
> THE COURT: You have your exception (481-482).

Such ruling, summation and charge insured a verdict for the respondent, and the jury rendered such a verdict. The petitioner thereafter moved to set the verdict aside. The Court denied the application in a memorandum decision which is included in the appendix to this petition. A judgment was entered on the verdict.

Petitioners appealed to the Appellate Division from the judgment and order denying the motion to set the verdict aside. On the appeal, the petitioners urged, among other things, that the refusal to allow petitioners to show the nature of the injuries sustained by the infant on the trial violated their constitutional rights. The Appellate Division affirmed the judgment and order below without opinion. A copy of its order of affirmance entered on February 16, 1971 is included in the appendix to this petition.

The petitioners thereafter took an appeal to the Court of Appeals as a matter of right and also moved before the Appellate Division for leave to appeal to the Court of Appeals. The respondent moved to dismiss the appeal taken to the Court of Appeals as a matter of right "on the ground that no consti-

tutional question is directly involved herein". By an order entered on April 9, 1971, a copy of which is included in the appendix hereto, the Appellate Division denied the application for leave to appeal to the Court of Appeals. By an order entered April 15, 1971, a copy of which is included in the appendix hereto, the Court of Appeals dismissed the appeal taken as a matter of right, but on the ground that "no substantial constitutional question is directly involved." The petitioners thereafter made a timely application for leave to appeal to the Court of Appeals. By order entered July 7, 1971, a copy of which is included in the appendix hereto, the Court of Appeals denied the application for leave to appeal.

The Reasons For Granting the Writ, and Arguments Thereon

A. In General

The reasons generally relied on for the allowance of the writ herein, and as discussed further below, are that several violations of the Fourteenth Amendment were indulged in by the State of New York in that its judiciary, in an automobile negligence case, by ordering a split trial first on liability and then on damages, prevented the plaintiff from introducing testimony concerning the injuries which are required to show in fact that these were caused by defendant and so to prove in some degree his liability; secondly, to tie in and link with defendant's conduct and plaintiff's injuries the inference

and proof of defendant's negligence which otherwise could not be done in this case because of the continued brain damage to the infant plaintiff and the defendant's tailored testimony as the only witness to the accident (liability); thirdly, that under the circumstances in this case where the infant plaintiff is for all practical purposes dead, there should be no onus placed upon her concerning her freedom from contributory negligence so that in so requiring she was deprived of her property rights, or cause of action, by compelling her to add an essential element thereto, and, additionally and separately, a further violation of said Amendment in that this was and is not required of others under analogous circumstances; and, fourthly, that there was an improper and unfair trial

which did not conform to the standards of due process.

B. Principles, Facts, and Law Involved

1.

New York's Civil Practice Law & Rules §603 is violative of the Fourteenth Amendment and unconstitutional when applied in a personal injury case arising out of an automobile accident where a split trial is ordered first on liability and on its face the statute therefore prevents a plaintiff from introducing testimony on the damage issue which may or does bear upon and prove or substantiate the liability testimony or issue and such inability so to prove lessens or destroys the value of the plaintiff's cause of action or weakens the plaintiff's proof on the liability and cause of action and also does not present to the triers of the facts the correct and true picture of the liability

situation.

A.) A common law cause of action by Jones against Smith, both private persons, is ordinarily private property. A state's deprivation of such property, without more, is a violation of the Fourteenth Amendment's Due Process Clause, and may also violate the Equal Protection Clause. A private cause of action involves a fact situation which contains certain essential or required elements. If one such essential element is missing there is an insufficient cause of action alleged or proved. If one essential element is added by a state, without more or justification, and thereby increases plaintiff's burden, this, too, is an impairment of one's said property rights because it now lessens or destroys the value of the original cause of action.

Phrased differently, a private common law cause of action is ordinarily to be protected on behalf of a plaintiff or required against a defendant, and in either case not to be tampered with, except where a sufficient reason is shown; for example, before workmen's compensation, the proof of freedom from contributory negligence, or the defenses of master-servant, etc. were upheld, but the inhuman consequences of an industrial-legal system compelled a change. See e.g., 35 Stat. 556, c.236 (1908), found today in 5 U.S.C. §8101 et seq., and for the F.E.L.A.'s provisions see 45 U.S.C. §53 et seq. While the employer's liability to the employee under such compensation act is exclusive, 5 U.S.C. §8173, there is substituted therefor outright compensation regardless of the employee's own contributory

negligence; however, the employee's private suit against a third person for that person's negligence is still permitted, §8132, and see also New York's Workmen's Compensation Law §29(1).

B.) So in the cause of action involved herein. The four essential elements ordinarily required to be proved in some manner by a tort plaintiff are: the duty of the actor, his failure so to comply, a causal connection with the injury, and the actual loss or damage to interests, W. Prosser, Handbook of the Law of Torts 143 (4th ed. 1971), which can be compressed into the two items of liability and damages. Contributory negligence, as a defense, is of comparatively recent development, e.g., in England in 1809 and in the United States in 1824, ibid., at 416, fn.1. As between private persons, where

no overriding public or governmental interest appears, these elements are not to be lessened or destroyed or otherwise trifled with by the states, legislatively or judicially, and ordinarily are constitutionally sacrosanct.

C.) New York's C.P.L.R. §603 authorizes, among other things, split trials in negligence cases so that the sole issue of liability is tried separately and first; then, if plaintiff is successful, a second trial is had solely on the damages involved. The federal analogue is F.R.C.P. 42(b) and, insofar as here pertinent, both statutes are identical in their language.

There is no argument that in many cases, for example, patent infringement, the issue of damages can be separated from other issues and submitted independently to the triers, and that proof of

any portion or peripherally connected item of damages is not ordinarily necessary in a trial limited solely to the issue of, for example, infringement. See, e.g., Swofford v. B & W, Inc., 336 F.2d 406, 415 (5th Cir. 1964), cert. denied 379 U.S. 962 (1965). Thus, while "[t]he trial piecemeal of separate issues in a single suit is not to be the usual course," 2B Barron & Holtzoff, Federal Practice & Procedure §943, at 187 (Wright ed. 1961), still, for the reasons behind Rule 42(b) and §603, other types of suits besides patent ones may likewise be so treated, i.e., separate trials on several issues. There is, however, one important qualification, furthered by a corollary.

That important qualification is expressed in Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494,

500 (1931), where the Fifth Circuit reversed in a suit for royalties in which counterclaims were interposed, directed a new trial, but restricted the issues to the determination of damages; in reversing and directing a new trial on all the issues raised by the counterclaim, Mr. (later Chief) Justice Stone wrote (in language equally applicable here to split trial cases) for an unanimous Court:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. ...Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. . . ."

Analogously in Norfolk S.R. Co. v.

Ferebee, 238 U.S. 269, 273 (1915), an F.E.L.A. case, where the North Carolina Supreme Court reversed and granted a new trial limited solely to the assessment of damages, and where the facts on contributory negligence were then excluded by the trial court, the unanimous affirmance of the lower judgment by this Supreme Court was only because the record disclosed that plaintiff was not guilty in fact of contributory negligence so that no federal substantive right or defense was involved, and the split new trial "in this particular instance [did not] operate to deprive the defendant of a Federal right," the opinion nevertheless contained this language:

> "But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a [state] rule of practice. Damages and contributory

> negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

In the Ferebee opinion, at 274, the Court also approved and adopted the state court's language, that before granting a partial new trial it should:

> "clearly appear that the matter involved is entirely distinct and separable from the other matters involved in the other issues and. . . that no possible injustice can be done to either party. . . ."

New York is not opposed to such doctrine or principles. For example, in Bennetti v. N.Y.C. Transit Authority, 22 N.Y.2d 742, 743, 239 N.E.2d 215 (1968), the entire bench apparently agreed in principle that where "the speed of the

vehicles was an essential element of plaintiffs' case on the issue of due care," then "[t]he exclusion of evidence of injuries. . .was reversible error in that such evidence had a direct bearing on the force of the impact and the relative speed of the vehicles involved. . . ." The only reason for the dissent was that the majority felt that "[i]t is manifest from the record" that the preceding language applied, whereas the minority apparently felt that in the case before it "evidence of plaintiffs' injuries has no bearing either on the defendant's negligence or on the speed at which its bus was traveling." Regardless, Bennetti is the law, and both the First and Second Departments of New York's Appellate Division likewise so hold. Culley v. City of N.Y., 25 A.D.2d 519, 520,

267 N.Y.S.2d 282 (1966), Lowe v. Board of Education, -- A.D.2d --, 321 N.Y.S.2d 508 (May 3, 1971).

In Culley the unanimous court reversed and directed a combined trial of liability and damages, and wrote that "where the nature of the plaintiff's injuries has an important bearing on the issue of liability, a separate trial should not be ordered," because there, "[i]n order for plaintiff to prove his case he must show that his injuries were in fact caused by defendant's negligence. . . . Essential to such determination is the nature and type of injuries." In Lowe a like reversal and combined trial was unanimously directed because while in a case "where causal connection is evident the medical proof is reserved" for a separate trial on damages, in "this particular case, the

causal connection is of such a nature as to require expert medical opinion." (It may be parenthetically noted that New York's Judicial Conference records do not indicate how many, if any, split negligence trials, or other trials, were directed, nor any statistics of aid herein. Report for 1969-70, Leg.Doc. [1971], No. 90, Table 8, facing page A58 [nor do the federal records so indicate].)

Of course an appellant seeking a new trial expressly or impliedly consents to such a partial reversal, as he is ordinarily requesting the exercise of discretion, whereas under F.R.C.P. 42(b) or C.P.L.R. §603 an objecting party may nevertheless be so compelled to try a case; or, even where all parties at the outset consent to such a split negligence trial (in Bennetti, supra, at 743, "[b]y agreement of counsel, the case was

tried solely on the issue of liability," and the Court of Appeals nevertheless held that evidence of the injuries "should have been allowed, accompanied by an appropriate limiting instruction"), a construction by the trial court preventing the introduction of testimony directly or peripherally on the damages so as to prove or bolster plaintiff's case or contradict the defendant on liability, is unfair, precludes a fair trial, deprives plaintiff of her constitutional rights, and was here opposed by the plaintiff (2-5, 19-20 [instruction by court that no inference is to be drawn that plaintiff infant's lack of memory is due to accident], 264 [sustaining objections to permitting father of infant to state where, that is, the hospital, child was taken after accident], and 481-2, further discussed below). And

Champlin Refining and Ferebee, supra, although involving federal statutes and federal statutory rights, handled by state courts, are even more applicable here where federal constitutional rights are involved and where, additionally, as Mr. Justice Stone commented, "a denial of a fair trial" would occur.

D.) The qualification on split trials, previously disclosed, is that where a trial of a single issue cannot be had without injustice, a denial of a fair trial occurs; the corollary, of course, is that the interests of justice would be served by one normal, regular, complete trial of the issues, and, additionally, there would not be a denial of a fair trial (in Lowe, supra, the Second Department reversed "on the law and in the interests of justice," at --, 509).

Included in this qualification and corollary is the inseparability aspect, that the relevant and pertinent evidence on two (or more) issues overlaps, so that rejection of evidence on the injuries which bears upon the liability in a negligence case lessens or destroys a plaintiff's rights. In other words, where such evidence is so inextricably intertwined with more than one issue, so as to result in a failure by plaintiff to prove his case without that evidence, or its rejection so lessens or weakens plaintiff's case as to bring into sharp question the ability of the triers to decide fairly and objectively, an unfair trial occurs, and a statute so permitting is to be denounced as a deprivation of plaintiff's property and other rights, or else the court's exercise of its power in the particular case, even

though it properly interprets the statute but now misapplies it, is to be so also denounced.

2.

Thus in particular, and as applied to the instant fact situation, the New York trial and appellate courts, in violation of the infant's rights under the Fourteenth Amendment, ordered a separate trial on the liability issue, and they then upheld rejection of all proferred testimony or evidence concerning plaintiff's injuries when she was 5 1/2 years old in 1959 and thereby suffering and still suffering from extensive brain damage which prevented and still prevents her from knowing or recalling anything and therefore testifying about the accident (i.e., she was and is practically and legally dead for this case), and also and separately com-

pelling her to assume the onus of proving freedom from contributory negligence which is not assumed by others in analogous cases and situations and which condition also permitted defendant, as the only witness to the occurrence, to give several versions at the second trial different from and inconsistent with that of his earlier testimony on the first trial and simultaneously preventing plaintiff from offering proof of the impact or injuries so as not only to prove her cause of action in direct and positive terms but also to show and prove that her injuries were in fact caused by defendant's negligence and also to contradict and reply to defendant's tailored testimony and thereby present to the jurors the true picture.

A.) In the conclusory sentence of the preceding argument it was suggested

that even if C.P.L.R. §603 were to be upheld because it, on its face and without more, was not unconstitutional, still, in the instant case, and under the particular and limited facts herein, the exercise of power thereunder was now, if not generally, to be denounced. Besides what has already been said in the above argument, additional reasons follow.

B.) Defendant's ultimate liability herein would ordinarily also depend upon plaintiff showing freedom from contributory negligence (if it applied). The facts disclose that defendant urged most vociferously such contributory negligence burden on the part of this 5 1/2 year old infant. Defendant's vociferousness may also be compared to diarrhea of the mouth. The record is replete with his numerous testimonial

changes, alterations, and downright reversals in and of the occurrence, all bearing on the infant's alleged contributory negligence, for example, at pages 15-17, supra, such instances are referred to and two of them (when, defendant claimed, he first saw the infant "when she just about touched my hood" and, again, when she was "24 feet away") must mean that, if they are both true and to be reconciled, this infant had arms almost 24 feet long! Even the New York Court of Appeals takes judicial notice of the physical impossibility of a human being's body being ridiculously out of proportion, Hunter v. New York, Ontario & Western R.R. Co., 116 N.Y. 615, 23 N.E. 9 (1889), and this principle likewise applies here.

To prove defendant's liability and her freedom from contributory negligence the infant had to present not only evi-

dence affirmatively so disclosing but also evidence to counter all these prevarications by the defendant; one reason is that under our adversary system a trial involves not only the affirmative presentation of evidence but also the disproof (by rebuttal, cross-examination, or otherwise) of the other party's contentions. This infant had been thrown a distance of between 10 to 12 feet (182), rendered unconscious, had a broken wrist, suffered a brain injury resulting in traumatic epilepsy (see, for example, plaintiff's bill of particulars, xix), and yet the defendant had the gall to swear, not once but twice, that "when this accident happened" "I was at a complete stop at the point of impact" (320), that his car "was at a complete stop" (370). How refute this? By direct

evidence to the contrary if, and only if, a witness could so testify, for example, the defendant's own examination before trial in which he first stated that the infant "was thrown" (252i) and, later on, "[a]pproximately three to four feet in front of the car" (371); or, perhaps, by disclosing physical facts otherwise; etc. If, thus, a child ran into a stopped car it would be extremely unlikely, undoubtedly impossible and in any event highly improbable, for her to be the recipient of such severe injuries. So that disclosing even only the fact that injuries occurred, if not their nature, extent, duration, etc., and connecting merely the fact of injuries to the accident causally, would tend to refute defendant's contentions of his non-liability and plaintiff's contributory negligence, and tend to substantiate plaintiff's

contentions on liability, and would strengthen and support plaintiff's case.

The evidence on damage was, therefore, in the context of this case, and based on defendant's own volunteered and tailored testimony, indissolubly connected and inextricably intertwined with the proof of the defendant's liability, as Champlin Refining, Ferebee, Bennetti, Culley, and Lowe, supra, all disclose and confirm.

C.) Damages, and their proof, are, as shown above, necessary and essential ingredients to success in a personal injury accident case. Even if defendant is negligent, and plaintiff is free from contributory negligence, there can be no recovery sans damages. See, e.g., M. Forkosch, Summary Judgment in Automobile Negligence Cases: A Procedural Analysis and Suggestions, 53 Cornell L.

Rev. 814, 817-18, fns. 15-16 (1968), disclosing instances of the rejection of plaintiff's motion for summary judgment, and requiring a plenary trial, where defendant concedes liability but, in its answer, merely denies generally the resultant (existence) of claimed damages. On split trials this issue and question may, perhaps, sometimes be permitted to intrude, but where, as here, the actuality of damages bears upon and is unquestionably required for the proof of the liability per se, and a tortured construction of a statute, or its tortured application, prevents plaintiff from offering any facts involving injuries on the question of liability because they also bear upon damage then unconstitutional deprivations occur.

The vice in such a situation is

that many courts fail to see that fact A. may be offered as proof of X., even though it also may be proof of Y., and Y. may not be in issue or else to be tried separately later on. Fact A. may, of course, be cumulative, and therefore may sometimes be properly rejected as overly-cumulative, but in the instant case it was not only necessary to prove X., i.e., liability, but it was the only way so to prove in and through the injuries (the second aspect of A. now to be used, and as in Champlin Refining through Lowe, supra), and, additionally, it was also to be used to refute defendant's tailored testimony.

It may be further added that the improper and unconstitutional conduct of the trial judge in not permitting testimony on the damages (to prove plaintiff's case on liability, or to

disprove defendant's lies, or both) cannot be upheld because of any consent to the split trial (see Bennetti, supra, at 743, quoting this exact fact there, also quoted above at page 39, with the reversal nevertheless occurring) or any so-called direction by the Appellate Division when the appeal after the first trial resulted in a reversal and sending it back for a new trial, for the direction was pro forma, based on the earlier consent, and neither of these precluded the admission of the evidence on interconnected and necessary proof of the injuries to disclose liability (or disprove defendant's lies, or both).

D.) Even if the burden of the lack of contributory negligence were removed from plaintiff's shoulders (for the New York death statute, adopted within a year after Lord Campbell's Act

was passed, was early construed to shift the burden of proof in this respect, e.g., McKay v. Syracuse Rapid Transit Co., 208 N.Y. 359, 101 N.E. 885 [1913], and in negligence actions alleging violations of rules of safe operation under the state's Labor Law the plaintiff's contributory negligence affords no defense, Koenig v. Patrick Const. Corp., 298 N.Y. 313, 317, 83 N.E.2d 133[1948]), still, there would remain the burden of proof of defendant's liability, and here, again, as just shown above, the evidence on the damages sustained by plaintiff was necessary.

E.) Regardless, separately, and additionally, such burden of lack of contributory negligence was in effect foisted upon this plaintiff, factually brain damaged, biologically alive but legally dead (i.e., she could not sign

a contract or otherwise act legally), without equating her with others analogously so situated, and this was a further denial of her rights under the Fourteenth Amendment. For example, a plaintiff of impaired mentality is, in many jurisdictions, enabled to utilize those substantive rules of negligence law which apply to children, e.g., Johnson v. St.Paul Ry. Co., 67 Minn. 260, 69 N.W. 900 (1897), so that, pari passu, a mentally impaired child should be treated doubly tenderly. Furthermore, such a mentally impaired infant should be analogized to the situation in which the New York judiciary, in a death case, does not hold the plaintiff to as high a degree of proof of the cause of action as where the injured plaintiff can herself describe the accident, e.g., Noseworthy v. City of New York, 298 N.Y.

76, 80, 80 N.E.2d 744 (1948). This was the argument made herein, but the trial court (upheld by the appellate courts) refused to consider her condition made her "the same as if she was legally dead and the burden" shifted (268), merely mouthed the view that she did not have to be held to the same proof as if able to testify (269) but then in fact so did hold her as above indicated and further disclosed in the record (e.g., at 481-2, after the trial judge's charge, plaintiff's attorney excepted thereto in several respects, at one point stating: "Then just for the record, Judge, I acceded throughout the course of this trial according to his Honor's direction not to go into any injuries sustained by this infant plaintiff and I would like to put on the record the fact that in a case of

this type where speed of a vehicle and looking out were so essential as part of my proof, the preclusion by the Court of any allusion to the injuries sustained by the infant under the Benatti against the New York City Transit Authority doctrine I feel was prejudicial, in error and I acceded to it because the Court said that this is the structure and the interdiction of the Appellate Division. But nevertheless to protect the record, I would like to take exception throughout the course of the trial to the Court's refusal to grant me such permission. THE COURT: "You have your exception").

Whether or not the classifications in the preceding paragraph are valid is presently immaterial; they do exist and were applied, and so in this particular case this plaintiff may avail herself

of the rights thereby incurred, for example, freedom from the burden of showing lack of contributory negligence, or not to be held to as high a degree of proof to show defendant's liability or her freedom, or, at the very least, to be permitted to offer evidence on her interrelated and intertwined damages so as to prove her case and disprove defendant's contentions and alleged evidence. Whether under the Fourteenth Amendment's Due Process Clause because of the lack of a fair trial, or its Equal Protection Clause because of the lack of equal protection as shown above, this plaintiff should therefore be entitled to the granting of the writ petitioned for herein so as to have either C.P.L.R. §603 held unconstitutional or, in its present application under the particular facts

herein, likewise so denounced.

3.

On the facts as disclosed in the record, the infant plaintiff was deprived of her rights under the Fourteenth Amendment because she did not receive a full and fair trial due to the sustaining of and the trial court's rejection of proferred testimony on the injuries claimed to bear upon and disclose liability in fact, its failure to relieve the infant plaintiff of the burden of contributory negligence because she was unable to testify on liability due to extensive brain damage resulting from the accident, its improper and prejudicial refusal to disqualify itself, and its subsequent improper and prejudicial conduct.

A.) Procedural due process requires

a fair trial, free of a variety of incidents, occurrences, distractions, and other factors militating against such constitutional right and command to state judiciaries. In the instant case certain reasons for contending a denial of this constitutional right occurred herein have been discussed. But others exist, for example, the bias of the trial judge, and it is only a few of these others which are presently discussed, else the record would have to be presented in full. The general picture of an unfair trial nevertheless comes through when the entire record is reviewed.

The trial judge's bias is disclosed first by his refusal to disqualify himself (6-11) even though trial counsel was then appealing another and different case in which the judge and counsel were

involved, and the latter's "brief and argument therein is devoted to errors by the trial Judge both as to evidentiary matters and also as to the active role as an advocate that the Judge took in the trial of the matter [plus other items]. . . . [T]he attitude of the Court towards me in that case was such and the bad feelings that resulted therefrom that in the interest of justice in this case, the climate of the case would not be conducive to a fair trial on behalf of this infant plaintiff and her father" (9). In addition, although the trial judge felt that he had no memory thereof, counsel next brought up a case some many years ago in which the infant's grandmother, an important witness now for the plaintiff infant, had herself been a plaintiff before the same judge, and in that case the grand-

mother had been threatened by this judge with contempt during her examination(9).

Bias is further disclosed even and especially after the trial proper, when, for example, the trial judge charged the jury (albeit here properly) that plaintiff had the burden of proof to establish her case by a fair preponderance "of the believable evidence," "the believable testimony," and that testimony "which you do not believe is not entitled to any verdict [sic]" (477), but in no place (and now improperly) did the judge ever refer to the defendant's side of the testimony in the same language, that is, say that his and his witnesses' testimony had to be "believable," as well as "believe[d]," i.e., both sides should have been so equally treated.

C. Conclusions

The record discloses a normal 5 1/2 year old girl, brain damaged by the defendant's negligent driving, but prevented from presenting her case fairly and properly by: (1) a statute which is either itself bad, i.e., unconstitutional as above indicated; (2) or else bad as applied herein, and all this regardless of the state's interpretation placed upon the language of this law, together with the unconstitutionally unequal treatment accorded this plaintiff; and (3) in addition, having an unfair and unconstitutional trial occur because of not only the preceding two subdivisions but in addition because of the trial judge's bias and conduct with the prejudice resulting therefrom.

It is respectfully submitted that equity and justice, besides facts, law, logic, and reason, cry aloud for this petition to be granted. This writ should run with respect to the three questions presented.

Respectfully submitted,

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Of Counsel:

Morris D. Forkosch
Fabian Palomino

Dated: New York, September 29, 1971

APPENDIX A

Opinion of Appellate Division

Reversing Judgment After First Trial

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian ad Litem, and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

June 18, 1969

Officially Reported in 32 A.D.2d 815 (Case 1)

In a negligence action to recover damages for personal injuries, medical expenses, etc., plaintiffs appeal from a judgment of the Supreme Court, Kings County, entered February 23, 1968 in favor of defendant, upon a jury verdict after trial of the issue of liability only. Judgment reversed, on the law and in the interests of justice, and new

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trial granted on the issue of liability only, with costs to abide the event. The findings of fact have not been affirmed. In our opinion, the infant plaintiff having been injured while in a roadway in 1959, it was error to admit into evidence a photograph of the street to show parking conditions at the time of the accident, when the photograph depicted the street some years later when private dwellings separated by driveways had been replaced by apartment houses. This picture should not have been received in evidence to show the parking situation, since the trial court thereby foreclosed plaintiffs' attorney from establishing that the automobiles were not as close to each other as indicated in the picture, because of the presence of

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driveways on the right-hand side at the time of the accident which were not shown in the picture. Defendant's contention was that the child ran between parked cars from the right side of the roadway. If the cars were as close to each other as shown in the picture it would tend to support defendant's contention that he could not have seen the child in time to avoid the accident. On the other hand, if the cars were not as close to each other on the right-hand side of the street as was shown in the exhibit, then this would bear on the question of whether or not defendant should have seen the child much sooner than he did had he been exercising reasonable care. Accordingly, the admission of the photograph was highly prejudicial. The court also erred when it allowed in

evidence the statement of Sally Smith, without instructing the jury as to its effect, particularly the lack of probative value. Since Smith said she did not see the accident, defendant had the right to confront her with her statement indicating otherwise. When she was shown her statement, she said it did not refresh her recollection; and on redirect examination by plaintiffs' counsel she still insisted that she did not witness the accident notwithstanding what was contained in her statement. Although the court remarked cursorily, "I am taking it for the purposes of credibility", that statement would be meaningless to the average juror and, therefore, the court should have instructed the jury as to the effect of the statement, namely, that

it was received only for the purpose of impeaching her credibility and that it had no probative value as to the happening of the accident. The trial court charged that the only evidence in the case on speed was that defendant was traveling at about 15 miles per hour and that evidence of "Skid marks in and of itself is no indication of speed of a vehicle." In our opinion this was error. Evidence of skid marks is pertinent and admissible as bearing on the speed at which the automobile was being operated at the time of the accident (Saladow v. Keystone Transp. Co., 241 App. Div. 161). There was additional error in the charge, when the trial court stated, "The law requires that she [the 5 1/2-year old infant] use her eyes and guard herself against any approaching vehicles",

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notwithstanding that this was followed by a statement that the child was required to exercise that degree of care which a reasonably prudent child of her years, experience, intelligence and degree of development would exercise under the same or similar circumstances. The vice in this instruction is that it was confusing in that it stated that the child was required to use her eyes and protect herself against approaching vehicles. Whether or not the child was to protect herself against approaching vehicles would depend upon her ability to appreciate danger and to protect herself against it. This was the issue that the jury was to determine, i.e., whether or not she had the mental capacity to be aware of danger and guard against it. The court further gave the following

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instructions: "The law does not say where she must cross a street nor where she must look nor how often she must look. All that the law requires is that she look and if she does so and finds that no automobiles are approaching that she proceed across, and, if an automobile should be approaching, then it becomes a question of how far was the automobile away from him or her. Under the law the infant plaintiff has a right to cross the street at any time, any place. The law does not require her to cross at a cross-walk. All the law does require her to do was to exercise reasonable care so as to avoid danger or injury to herself." In this instruction, the court was setting forth the duty that devolves upon an adult or one who is sui juris and stressing that the infant

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plaintiff was required to look and see whether any automobiles were approaching. This instruction must also be deemed confusing because the jury was told first that the child was required to look and then that she had to exercise only that degree of care that a child her age would be expected to exercise. The trial court in its charge also summarized various sections of the New York City Traffic Regulations as follows: "Section 41, right of way in crosswalks, notwithstanding the provisions of subsections A and B of this section no pedestrian shall suddenly leave the curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impracticable for the driver to yield. Section 42, entitled restrictions on crosswalks, subdivision

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A, a pedestrian crossing a roadway other than within a marked or unmarked crosswalk, shall yield the right of way to all vehicles upon the roadway." The trial court then instructed the jury that they must determine whether the 5 1/2-year-old plaintiff had violated these regulations and then determine whether she had the mental capacity to understand the meaning of the regulations and to comply with them. In our opinion this was error. Although an adult is presumed to know the law, we believe as a matter of law that a 5 1/2-year-old child cannot be charged with a knowledge and understanding of these regulations and compliance with them. Hence, it was not merely confusing to the jury, but also prejudicial

error to charge the contents of these traffic regulations to the jury and to submit to them an issue whether the child knew and understood the regulations and nevertheless violated them. Even if we are to assume arguendo that this was a matter of fact for the jury to decide, the charge was inadequate because it did not explain to the jury the significance of right of way or yielding a right of way as explained by the Third Department in Chandler v. Keene, (5 A D 2d 42, 45). Rabin, Acting P.J., Benjamin, Munder and Martuscello, JJ., concur. Kleinfeld, J., concurs in result.

APPENDIX B

Memorandum Decision Denying Motion to Set Verdict Aside

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian ad Litem, and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

FEIDEN, J.

Cal No. 11958

Index No. 20426/62

Filed: August 27, 1970

This is a motion on behalf of the infant plaintiff to set aside a jury verdict in favor of the defendant in a negligence action tried on the issue of

liability.

Insofar as the application is based upon statements of jurors made after the trial to plaintiffs' attorneys the application is based on incompetent proof and is utterly without merit. It appears from the affidavit of Donald Dugan that plaintiffs' attorneys solicited the jurors about their motives. Aside from the fact that the ethics of such conduct is questionable (Sindle v. 761 Ninth Ave. Corp., 127 N.Y.S. 2d 258, affd. 283 App. Div. 939), it is hornbook law that courts, as a matter of public policy, will not receive the affidavits of jurors to impeach their verdict. A fortiori the hearsay affidavits of plaintiffs' attorneys or interested parties are insufficient

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to serve as the basis for the impeachment of the jury's verdict (see People v. DeLucia, 15 N Y 2d 294, 296; Sindle v. 761 Ninth Ave. Corp., supra; People v. Sprague, 217 N.Y. 373; Davis v. Lorenzo's, Inc., 258 App. Div. 933; Tartacower v. New York City Transit Authority, 9 Misc 2d 606).

The plaintiff's argument that the verdict should be set aside because the evidence preponderates in favor of the plaintiff is likewise without merit. A verdict for a defendant can be set aside only if the evidence is so preponderately in plaintiff's favor that a jury could not have reached its conclusion on any fair interpretation of the evidence (Indiere v. Strickroth, 32 A D 2d 957; Ladson v. NYCHA, 31 A D 2d 611;

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Knise v. Shearer, 30 A D 2d 741; Carino v. Marino, 28 A D 2d 514). The evidence herein involved simple issues of credibility and was such that a jury could easily have reached its conclusion on a fair interpretation of the conflicting evidence. (It is pertinent to note that this is the second trial of the issue of liability and in each trial a jury returned a verdict in favor of the defendant on the facts. The verdict in the first trial was set aside for errors in instructions to the jury.) The plaintiffs' case was vigorously and ably presented to the jury by experienced trial counsel and it was the perogative of the jury to reject the plaintiffs' version of the accident.

Plaintiff also urges that the court was in error with respect to that

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part of its charge concerning contributory negligence which related to the question of proximate cause. It is urged by the plaintiff that the court did not adequately explain to the jury that the contributory negligence of the infant plaintiff could only defeat a verdict if it was the proximate cause of the accident. The record demonstrates that such claim is not warranted. The court in its main charge instructed the jury as follows:

> " * * * The plaintiff, Robin Dugan, too was under a duty to use reasonable care. If she failed in that duty and such failure was a* cause of the accident then she was guilty of contributory negligence."

The court then went on to explain in great detail how to apply the test of reasonable care in the case of an infant 5-1/2 years of age. At the end of the main charge, plaintiff's attorney

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excepted to that portion of the charge on contributory negligence which failed to use the words "proximate cause". The attorney stated: "The bald statement that contributory negligence of the child would preclude recovery I believe is inaccurate in that you failed to say that it must still be the proximate cause of the accident." This statement by plaintiff's attorney did not reflect the actual charge of the court as indicated above, but nevertheless the court made this additional charge to the jury as a result of plaintiff's counsel's exception and specific request:

> "If the child failed to exercise reasonable care and such failure was the proximate cause of the accident then she is guilty of contributory negligence."

No exception was taken to this additional charge.

The court's charge on proximate

cause was in accordance with the viewpoint expressed in the recent case of Ortiz v. Kinoshita & Co. (30A D 2d 334, 336,337). It is to be noted that the court scrupulously avoided using the words "substantial factor" because it is easily misunderstood by a jury, as pointed out in the Ortiz decision. It is stated in that decision that it is important that a charge be reduced to terms likely to be understood by the jury. It is hard to conceive how the wording in the main charge could be made more simple and more easily understood. It was for that reason that the court did not use the word "proximate" in the main charge and only did so in its supplemental charge at the specific request of plaintiff's attorney. In any event, a reading of both the main charge and the supplemental

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charhe on this issue makes it clear that the jury was correctly charged.

The motion is denied in all respects.

* The stenographer's minutes inaccurately uses the words "the cause" instead of "a cause".

Dated: August 27, 1970

APPENDIX C

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 16, 1971

HON. JAMES D. HOPKINS,
Acting Presiding Justice.

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian ad Litem, and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

Order on Appeal from Order and Judgment

In the above entitled cause, the above named Robin Dugan, etc., et al., plaintiffs, having appealed to this court from a judgment of the Supreme Court, Kings County, entered October 22, 1970 and from an order of the same court dated October 7, 1970; and the

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said appeal having been submitted by Eileen Newmark, Esq., of counsel for the appellant, and argued by Thomas Grimes, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment and order appealed from are hereby unanimously affirmed, with one bill of costs.

Enter: HERMAN M. POGUL

Clerk of the
Appellate Division

APPENDIX D

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 9, 1971

HON. JAMES D. HOPKINS,
Acting Presiding Justice.

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian ad Litem, and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

Order on Motion to Reargue Appeal or to Appeal to the Court of Appeals

In the above entitled cause, the above named Robin Dugan, etc., et al., appellants, having moved to reargue the appeal or for leave to appeal to the Court of Appeals; from an order of this court, dated February 16, 1971;

Now, upon the papers filed in

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support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter: HERMAN M. POGUL

Clerk of the
Appellate Division

APPENDIX E

STATE OF NEW YORK,

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of April A.D.1971.

PRESENT, Hon. Stanley H. Fuld, Chief Judge, presiding.

Mo. No. 334

Robin Dugan, an infant, by Donald Dugan, her guardian ad litem, and Donald Dugan, individually,

Appellants,

vs.

Jack Dieber,

Respondent.

Order Dismissing Appeal

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to

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this Court, papers having been submitted thereon and, after having heard Thomas Grimes, Esq., of counsel for respondent, in support of said motion and Eileen Evans Newmark, Esq., of counsel for appellants, in opposition thereto, due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Seal

Deputy Clerk

APPENDIX F

STATE OF NEW YORK,

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A.D.1971.

PRESENT, Hon. Stanley H. Fuld, Chief Judge, presiding.

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2 Mo. No. 523

Robin Dugan, an infant, by Donald Dugan, her Guardian ad Litem, and Donald Dugan, Individually,

Appellants,

vs.

Jack Dieber,

Respondent.

Order Denying Leave to Appeal

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had,

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it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

Deputy Clerk

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Supreme Court, U.S.
FILED
OCT 21 1971
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 472~~ 71 - 472

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian *ad Litem,* and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent
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BE 3-5010

THOMAS GRIMES,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 472

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian *ad Litem,* and DONALD DUGAN, individually,

Petitioners,

vs.

JACK DIEBER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Jack Dieber (hereinafter referred to as the "respondent"), submits this brief in opposition to the petition for writ of certiorari filed herein by the petitioners. The petitioner, Robin Dugan, will be referred to hereinafter as the "petitioner."

The respondent takes the position that, in the first place, no constitutional question is presented by the petitioner and that, in any event, the question she seeks to raise is unsubstantial.

The Proceedings in This Action in the New York Courts

This litigation arises from an accident that occurred on July 31, 1959. At that time, as the record shows, the petitioner ran out from between parked cars across a one-way Brooklyn street from a point in the middle of the block and came in contact with the respondent's automobile. The case was tried twice before a jury and after each trial the jury returned a verdict in favor of the respondent. The judgment entered in favor of respondent upon the jury's verdict at the first trial was reversed by the Appellate Division, Second Department, with an opinion that is reported in 32 A. D. 2d 815-816 (decided June 18th, 1969). The appellate court granted a new trial to the petitioner upon the ground that the Trial Judge had committed reversible error in the admission and exclusion of evidence and in certain of his instructions to the jury. The decision of the Appellate Division directed the following disposition of the appeal (page 815 of 32 A. D. 2d): "Judgment reversed, on the law and in the interests of justice, a new trial granted on the issue of liability only, with costs to abide the event." Petitioner accepted that decision. She did not seek a resettlement of the order of the Appellate Division which had limited the new trial to the issue of liability only but proceeded to try the case a second time pursuant to that order. At this second trial, her counsel offered to introduce medical proof to show the extent of her injuries as bearing upon the issue of liability but the Trial Judge ruled that he was bound by the order of the Appellate Division and on that basis excluded the proffered medical proof. When this second jury returned a verdict in the respondent's favor, the petitioner appealed again to the Appellate Division, Second Department. On that appeal she

submitted a forty-three page brief, containing fourteen points, on the basis of which she argued, by the way, not that she should have a new trial, but that the Appellate Division should direct a verdict in her favor. Presumably, her counsel had thought better of bringing the facts of this particular case before another jury for consideration.

Petitioner's brief in the Appellate Division contained the same garbled and absurdly distorted statement of the record that appears in her papers in this Court. For instance, her counsel argues in her application for certiorari that it was unjust to hold the petitioner responsible for contributory negligence because the petitioner is really dead—although, at last reports, the petitioner was very much alive—and she disposes of the respondent's testimony, at least to her own satisfaction, by characterizing his testimony (page 45 of her petition in this Court) as comparable to "* * * diarrhea of the mouth." This kind of offensive language has characterized her papers at every stage of this proceeding. Her premise seems to have been that abuse of the respondent, of his attorneys and of the Trial Judge, is a substitute for a meritorious cause of action.

Thus, in the present instance, it is impossible to tell from the papers submitted herein by counsel for petitioner the precise nature of the constitutional question that she raised in the New York Courts. In her forty-three page brief in the Appellate Division, Point VIII, among her fourteen points, makes a reference to the petitioner's alleged "constitutional rights." In this connection, Point VIII of her brief in the Appellate Division reads, in full, as follows:

"POINT VIII

A TRIAL LIMITED TO LIABILITY ONLY WITH REFUSAL TO ALLOW PLAINTIFF TO SHOW THE NATURE OF INJURIES AS PROOF OF SPEED AND IMPACT, DEPRIVED THE INFANT OF A FULL AND FAIR TRIAL AND THEREFORE OF HER CONSTITUTIONAL RIGHTS.

The trial court precluded the plaintiff's attorney from alluding to any injuries sustained by the infant, in this case, tried on liability only and no eye witness but the defendant, on the grounds that this was the structure and the interdiction of the Appellate Division. A careful reading of the opinion in *Dugan* v. *Dieber*, 302 A.D. 423 shows no mention of the trial court's contention in this area.

In *Bennetti* v. *N. Y. City Transit Authority*, 22 N.Y. Reports 2nd Sec. 742, the court held:

> "It is manifest from the record that the speed of the vehicles were an essential element of the Plaintiff's case on the issue of due care. The exclusion of evidence of injuries to passengers on the bus was reversible error that such evidence had a direct bearing on the force of the impact and the relative speed of the vehicles involved.

This case having been tried on liability alone and the jury not being able to see any evidence of injuries, 11 years later, came to the erroneous conclusion that the car actually was stopped on impact. Had they known that the distance the child was thrown resulted in traumatic epilepsey, they could better judge the speed of the defendant. Therefore, even if there were no bias on the part of the court, there still was an error of law and

there should be a reversal of the jury's verdict and a reversal of the trial court's refusal to reverse pursuant to the motion made under C. P. L. R. 4404."

The foregoing is the entire "Constitutional" issue raised by the appellant in the State Court.

The Appellate Division unanimously affirmed the judgment in favor of the respondent and denied petitioner's motion for leave to appeal to the Court of Appeals. Petitioner also took a direct appeal as of right to the Court of Appeals, a procedure that is available to an appellant only if a substantial constitutional question under the State or the Federal Constitution is directly involved in the case. On respondent's motion the Court of Appeals dismissed the appeal taken by petitioner as of right and subsequently denied her motion for leave to appeal.

Neither in her application in the Appellate Division for leave to appeal to the Court of Appeals nor in her application in the Court of Appeals for leave to appeal to that Court, nor in her papers opposing the respondent's motion in the Court of Appeals to dismiss the appeal she had taken there as a matter of right, did petitioner raise the question of the constitutionality either under the State or under the Federal Constitutions of Section 603 of the Civil Pracice Law and Rules, the argument upon which she now seeks to peg her petition for certiorari in this Court.

The Respondent's Contention in Opposition to This Petition for Certiorari

The respondent contends that the petitioner did not raise in the State Court any question under the Federal Constitution and that the question which she now seeks to argue is unsubstantial.

A copy of the record on appeal in the Appellate Division, certified by the counsel for appellant, is submitted herewith.

POINT I

Petitioner did not raise any constitutional question in the State Court; the question which she now seeks to argue is unsubstantial.

In Point VIII of her brief in the Appellate Division, the first argument made by petitioner is that the Trial Court, when it ruled that the Appellate Division had limited the second trial to the issue of liability only, misread the Appellate Division's opinion reversing the judgment in favor of respondent upon the first trial. Thus petitioner argued at page 29 of her brief in the Appellate Division that "a careful reading of the opinion in *Dugan* v. *Dieber,* 302 A. D. 423 (the correct citation is 32 A. D. 2d 815) shows no mention of the trial court's contention in this area." Presumably, the foregoing was intended to assert that the Trial Court misunderstood the Appellate Division's opinion directing a new trial. The obvious answer to that argument is that the Appellate Division stated, in so many words, that a new trial was granted "on the issue of liability only, * * *" (page 815 of 32 A. D. 2d).

Secondly, under Point VIII of her brief in the Appellate Division, the petitioner called the Court's attention to a decision by the New York Court of Appeals in *Bennetti* v. *New York City Transit Authority,* 32 N. Y. 2d 742 (1968). The *Bennetti* case involved not a constitutional question but solely a question of State law concerning the admissibility of evidence. In the *Bennetti* case the Court of Appeals held that in a motor vehicle col-

lision case where the record indicated that the speed of the vehicles involved in the collision was an essential element of the plaintiffs' case, the Trial Court was wrong in excluding evidence of injuries to the plaintiffs; the Court's theory was that such evidence of injuries had a direct bearing on the question of the force of the impact and the relative speed of the vehicles that were involved. Thus, the *Bennetti* case shows that the highest Court in New York is well aware that, in particular instances, it is prejudicial to a plaintiff's rights to exclude medical evidence on the issue of liability.

More than that, the Appellate Divisions are well aware that in certain situations a plaintiff would be prejudiced if his offer of medical evidence were excluded upon a trial limited to the issue of liability.

In *Culley* v. *City of New York*, 25 A. D. 2d 519-520 (1st Dept., 1966), the Appellate Division, First Department, in ordering a new trial in a negligence action, had the following to say (page 520 of 25 A. D. 2d):

> "The practice of holding separate trials in negligence actions—first on liability, and then on damages—is not to be discouraged. However, where the nature of the plaintiff's injuries has an important bearing on the issue of liability, a separate trial should not be ordered. Such proved to be the case here. In order for plaintiff to prove his case he must show that his injuries were in fact caused by defendant's negligence. We cannot draw that conclusion from the record in this case. Essential to such determination is the nature and type of injuries. It is for that reason that we direct that liability and damages should be tried together on the retrial."

The Appellate Division, Second Department, took a similar position in the case of *Williams* v. *City of New York*, 36 A. D. 2d 620 (decided February 1st, 1971). In that case the appellate court, in granting a new trial, said (page 620 of 36 A. D. 2d):

> "In our opinion, under the circumstances of this case, the issue of liability, insofar as it involved the question of the use of excessive force by the police officer, accepted by the trial court and the litigants as a question in the case, and the issue of the injuries sustained and attributable to such excessive force, were inseparable. In that perspective, the extent of such injuries constituted admissible evidence insofar as it was probative of the use of excessive force and the exclusion of such evidence was tantamount to a denial of a fair trial to plaintiff (*Gasoline Prods. Co.* v. *Champlin Co.*, 283 U. S. 494, 500). Accordingly, it is our view that a departure from the authorized and accepted practice of separately trying issues of liability and damages was warranted and that one trial of these combined issues is indicated in the proper exercise of discretion (see *Culley* v. *City of New York*, 25 A D 2d 519)."

Moreover, an order directing a separate trial, made by the Court of first instance over objection of plaintiff, is appealable by the plaintiff to the Appellate Division; he does not have to await the result of a trial in which his medical proof will be excluded (*Dillenbeck* v. *Bailey*, 32 A. D. 2d 735 (4th Dept., 1969).

Therefore, if counsel for the petitioner believed that she needed medical evidence to prove her case on the issue of liability, a timely application to the Appellate Division to resettle its order would have been an available

remedy. Instead, she proceeded to try her case pursuant to the appellate court's ruling limiting her to the liability issue. Under those circumstances, the Trial Judge's hands were tied because he was bound by the ruling of the higher Court.

Furthermore, counsel for petitioner misstates the record when she argues, in effect, that the respondent himself was the only available eyewitness to the accident. The record indicates that, as a matter of fact, other eyewitnesses were available but that the petitioner did not produce them. That was the point of the argument made by trial counsel for respondent in his summation with respect to the petitioner's so-called "burden of proof," a garbled version of which summation is given in the petitioner's papers in this Court at page 19.

Petitioner also makes an incidental argument that she was deprived of her right to a fair trial because she was charged with the burden of proving her own freedom from contributory negligence. That contention does not raise an issue under the Federal Constitution, but it might be pointed out—although one could not glean this fact from the petitioner's papers—that, under the instructions of the Appellate Division, the Trial Court gave a full and fair charge with respect to the minimal responsibility that the New York law places upon a young child with respect to her own duty of due care. Petitioner argued in the Court of Appeals that the Court decisions putting some minimal responsibility upon a five year old child should be overruled but the Court of Appeals rejected that contention. It seems clear that this issue poses only a question upon which the decisions of the highest Court of the State are final.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

DANIEL J. COUGHLIN,
Attorney for Respondent.

THOMAS GRIMES,
On the Brief.